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No. 88-1742

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL ADAMS, *et al.*,

Petitioners,

vs.

AVCO CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT B. NEWMAN
KIRCHER AND PHALEN
125 East Court Street, Suite 1000
Cincinnati, Ohio 45202
(513) 381-3525
Counsel of Record

ROBERT H. MITCHELL
KIRCHER AND PHALEN
125 East Court Street, Suite 1000
Cincinnati, Ohio 45202
(513) 381-3525
Counsel for Petitioners

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED

Whether the *de novo* standard of review stated by this Court in *Firestone Tire and Rubber Company* v. *Bruch*, 489 U.S. ___, 109 S.Ct. 948 (February 21, 1989), rather than an arbitrary and capricious standard of review, applies to respondents' denial of severance pay and full early retirement benefits to petitioners under the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a)(1)(B).

LIST OF PARTIES

Petitioners comprise the same group of individuals as plaintiffs/appellants below. Petitioners are:

> Paul Adams, Lavern Bettinger, Lavern Brockman, Thomas Budde, Gene Buschur, Richard L. Faller, Thomas F. Hedrick, Donald W. Kaiser, Louis W. Keiser, Paul L. Klingshirn, Jerry E. Knapke, Robert U. Link, Thomas A. Mescher, Joan Myers, Joseph U. Rose, Lavern Schmit and Robert L. Weitzel.

Respondents comprise the same group of entities as defendants/appellees below excepting the Avco Corporation Group Insurance Plan for Salaried Employees. The Group Insurance Plan was a separate appellee below on the sole issue regarding petitioners' entitlement to insurance benefits; since that issue is not addressed in this petition, the Group Insurance Plan is not named as a party herein. Respondents are:

> Avco Corporation, Avco Corporation Retirement Income Plan for Salaried Employees (PN) — #001 and Avco Corporation Severance Pay Plan d/b/a Avco/New Idea Policy — Salaried Personnel P-SP No. 14.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL ADAMS, *et al.*,

Petitioners,

vs.

AVCO CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Paul Adams, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on November 14, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the appendix hereto, p.1a, *infra*.

The opinion and order of the United States District Court for the Northern District of Ohio (Potter, D.J.) has not been reported. It is reprinted in the appendix hereto, p.5a, *infra*.

The order of the Court of Appeals for the Sixth Circuit denying rehearing has not been reported. It is reprinted in the appendix hereto, p.16a, *infra*.

The order of the United States District Court for the Northern District of Ohio dismissing this action has not been reported. It is reprinted in the appendix hereto, p.17a, *infra*.

JURISDICTION

Invoking jurisdiction under 29 U.S.C. § 1132 and the substantive laws of Ohio, petitioners brought this suit in the Court of Common Pleas, Mercer County, Ohio in January of 1986. Upon respondents' petition, the United States District Court for the Northern District of Ohio assumed jurisdiction and removed the action from state court under 28 U.S.C. § 1441 in February of 1986. On July 10, 1987, the Northern District granted in part and denied in part petitioners' motion for summary judgment, and granted in part and denied in part respondents' motion for summary judgment. See p.15a, *infra*.

Upon cross-appeals, the Sixth Circuit on November 14, 1988, entered judgment and an opinion affirming the Northern District's partial grant of summary judgment for respondents, reversing the Northern District's partial grant of summary judgment for petitioners, and remanding to the Northern District with instructions to dismiss the action. See p.1a, *infra*.

On January 26, 1989, the Sixth Circuit denied petitioners' timely petition for rehearing. See p.16a, *infra*.

On March 14, 1989, the Northern District dismissed this action pursuant to the instructions of the Sixth Circuit. See p.17a, *infra*.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This action generally involves the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Specifically, the following section of ERISA is relied upon:

29 U.S.C. § 1132. *Civil enforcement*

(a) Persons empowered to bring a civil action —

A civil action may be brought—

(1) by a participant or beneficiary—

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

* * *

STATEMENT OF THE CASE

Petitioners are former salaried employees of respondent Avco Corporation ("Avco"). In July of 1984, Avco terminated the employment of petitioners upon its sale of the New Idea Farm Equipment Company of Coldwater, Ohio to Allied Products.[1] In January of 1986, petitioners commenced the present action in the Court of Common Pleas, Mercer County, Ohio, seeking recovery of various employee benefits from Avco under the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a)(1)(B), (c) and (e), and the substantive laws of the State of Ohio. Upon respondents' petition, the United States District Court, Northern District of Ohio, Western Division, assumed jurisdiction and removed the action from state court under 28 U.S.C. § 1441 in February of 1986.

Petitioners' second amended complaint, filed in January of 1987, asserted eleven separate counts for recovery of various employee benefits and statutory damages. The instant proceedings involve two of those counts, III and VII. Count III sought recovery of severance pay benefits from Avco and respondent Avco Corporation Severance Pay Plan, d/b/a Avco/New Idea Policy-Salaried Personnel P-SP No. 14 ("Severance Pay Plan").[2] Petitioners asserted that denial of severance pay contravened the governing plan document and constituted a breach of Avco's fiduciary duties. Count VII sought recovery of "full" early retirement benefits from Avco and respondent Avco Corporation Retirement Income Plan for Salaried Employees (PN)—#001 ("Retirement Plan"). Petitioners asserted that failure to tender full early retirement benefits, as opposed to lesser "deferred vested" benefits, contravened the governing plan documents and constituted a breach of Avco's fiduciary duties.

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[1] Allied Products has never been a party to these proceedings.

[2] Petitioner Lavern Bettinger did not assert a severance pay claim, already having received this benefit.

The District Court resolved this action upon the parties' cross-motions for summary judgment by opinion and order dated July 10, 1987 (p.5a, *infra*). Citing *Blakeman* v. *Mead Containers*, 779 F.2d 1146 (6th Cir. 1985), *Jung* v. *FMC Corporation*, 755 F.2d 708 (9th Cir. 1985) and *Adcock* v. *Firestone Tire and Rubber Co.*, 822 F.2d 623 (6th Cir. 1987), the District Court first determined that an arbitrary and capricious standard of review must apply under 29 U.S.C. § 1132(a)(1)(B) to Counts III and VII:

> [t]his Court . . . will only decide if the denial of benefits by the administrator of the Plan was arbitrary, capricious, or in bad faith.

See p.8a, *infra*. Applying this standard to Count III, the District Court granted respondents' motion for summary judgment, accepting respondents' interpretation of the Severance Pay Plan that unemployment was a condition precedent to receipt of severance pay (p.10a, *infra*). Applying the arbitrary and capricious standard to Count VII, however, the District Court granted petitioners' motion for summary judgment, rejecting respondents' interpretation of the Retirement Plan as requiring a payment of lesser "deferred vested" benefits to petitioners, finding this interpretation contrary to the documents and instruments governing the Retirement Plan (p.14a, *infra*).

On November 14, 1988, the Sixth Circuit entered its opinion upon the parties' cross-appeals (p.1a, *infra*). The Sixth Circuit first determined that:

> [a]s the district court correctly noted, decisions of fund administrators to deny benefits must be affirmed unless the decision was arbitrary, capricious, in bad faith, erroneous as a matter of law or unsupported by substantial evidence. *See Adcock* v. *Firestone Tire and Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987); *Blakeman* v. *Mead Container*, 779 F.2d 1146, 1149 (6th Cir. 1985).

See p.3a, *infra*. Next, the Sixth Circuit summarily affirmed

dismissal of Count III[3] "[b]ecause we agree with the district court's conclusion that Avco's interpretation of the severance policy does not meet this [arbitrary and capricious] standard . . .". See p.3a, *infra*. Finally, the Sixth Circuit reversed the District Court's grant of summary judgment for petitioners upon Count VII. Applying the arbitrary and capricious standard of review as stated in *Cook* v. *Pension Plan for Salaried Employees*, 801 F.2d 865, 870 (6th Cir. 1986), the Sixth Circuit concluded that respondents' interpretation of the Retirement Plan, so as to deny payment of full early retirement benefits to petitioners, was "not contrary to the language of the Retirement Plan provisions". See p.4a, *infra*. Accordingly, the Sixth Circuit remanded to the District Court with instructions to dismiss the complaint, including Counts III and VII. See p.4a, *infra*.

[3] Mistakenly identified as Count "II" in the Sixth Circuit's opinion.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's application of an arbitrary and capricious standard of review to petitioners' benefit denial claims conflicts with a decision of this Court.

In *Firestone Tire and Rubber Company* v. *Bruch*, 489 U.S. ____, 109 S.Ct. 948 (February 21, 1989), this Court held that a denial of employee benefits challenged under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), is subject to a *de novo* standard of review. *Id.*, 109 S.Ct. at 956. The Court expressly rejected application of an arbitrary and capricious standard of review except in those circumstances where a benefit plan gives an administrator discretionary authority to determine eligibility for benefits or to construe the provisions of the plan. *Id.* The courts below, however, applied an arbitrary and capricious standard of review to petitioners' claims. See pp.1a and 5a, *infra*. Petitioners' arguments for a less deferential standard of review were ignored, and no independent determination was made of whether the plan documents vested respondents with discretionary powers warranting imposition of the arbitrary and capricious standard.

While this Court's *Bruch* decision did not issue until February 21, 1989, some three months after the Sixth Circuit's decision herein,[4] issuance of a writ of certiorari nonetheless is appropriate. Three separate writs of certiorari have issued upon petitions presented to this Court subsequent to *Bruch*; in each instance, the lower court's judgment was vacated and the case remanded for further consideration in light of *Bruch*. *See DeGeare* v. *Slattery Group, Inc.*, 489 U.S. ____, 109 S.Ct. 948 (February 27, 1989); *Combustion Engineering, Inc.* v. *Saporito*, 489 U.S. ____, 109 S.Ct. 948 (February 27, 1989); *Rowe* v. *Allied Chemical Hourly Employees' Pension Plan*, 489 U.S. ____, 109 S.Ct. 948 (February 27, 1989). Petitioners respectfully submit that the same result should attend herein.

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[4] Less than one month after the Sixth Circuit denied rehearing. See p.16a, *infra*.

CONCLUSION

For these reasons, petitioners respectfully request this Court to grant the petition for certiorari, summarily vacate the judgment of the Sixth Circuit and remand the case to that court with instructions to remand to the district court for further consideration in light of *Firestone Tire and Rubber Company* v. *Bruch*, 489 U.S. ____, 109 S.Ct. 948 (February 21, 1989).

Respectfully submitted,

ROBERT B. NEWMAN
KIRCHER AND PHALEN
125 East Court Street
Suite 1000
Cincinnati, Ohio 45202
(513) 381-3525

Counsel of Record

ROBERT H. MITCHELL
KIRCHER AND PHALEN
125 East Court Street
Suite 1000
Cincinnati, Ohio 45202
(513) 381-3525

Counsel for Petitioners

APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 87-3830/3831

PAUL ADAMS, LAVERN BETTINGER, LAVERN BROCKMAN, THOMAS BUDDE, GENE BUSCHUR, RICHARD L. FALLER, THOMAS F. HENDRICK, DONALD W. KAISER, LOUIS W. KEISER, PAUL L. KLINGSHIRN, JERRY E. KNAPKE, ROBERT U. LINK, THOMAS A. MESCHER, JOAN MYERS, JOSEPH U. ROSE, LAVERN E. SCHMIT, ROBERT L. WEITZEL,
Plaintiffs-Appellees,
Cross-Appellants,

v.

AVCO CORPORATION; AVCO CORPORATION RETIREMENT INCOME PLAN FOR SALARIED EMPLOYEES, IRS PLAN No. PN #001; AVCO CORPORATION GROUP INSURANCE PLAN FOR SALARIED EMPLOYEES, IRS PLAN NO. PN #509; AVCO CORPORATION SEVERANCE PAY PLAN d/b/a AVCO/ NEW IDEA POLICY — SALARIED PERSONNEL P-SP No. 14,
Defendants-Appellants,
Cross-Appellees.

**ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OHIO**
(Filed November 14, 1988)

BEFORE: JONES and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Defendants appeal and plaintiffs cross-appeal the district court's order which granted the plaintiffs' motion for partial summary judgment. For the following reasons, we affirm in part, reverse in part and remand.

I.

In July of 1984, plaintiffs/cross-appellees, seventeen ex-employees of Avco Corporation ("Avco") were terminated from their employment when Avco sold one of its divisions ("Division") to Allied Products Corporation ("Allied"). When Avco sold the Division, all but one of the terminated employees were subsequently employed by Allied. Pursuant to Avco's Severance Pay Plan, the employee who was not hired by Allied received severance pay from Avco; however, none of the other terminated employees received severance benefits. After the employees complained that they also were entitled to severance pay under the Plan, Avco responded that the severance pay provisions applied only to workers who suffered a period of unemployment. The employees argued, however, that since the Plan provisions did not contain the word "unemployment," unemployment was not a prerequisite for receiving severance benefits.

When Avco sold the Division to Allied, Avco's Retirement Plan provided for normal retirement at age 65 and for early retirement between the ages of 55 and 65 for employees who had 10 years of service with Avco. While none of the employees were eligible for early retirement when they worked for Avco, several of them became eligible and elected to receive early retirement benefits after they began working for Allied. Avco contends that if the employees had still been

employed by Avco, they would have been eligible for an 85% early retirement benefit. However, since they no longer worked for Avco, Avco determined that they were entitled to only an actuarially equivalent retirement pension which was reduced by 50%.

The plaintiffs-appellants filed an action against Avco and its Severance Pay and Retirement Plans ("Plans") in the United States District Court for the Northern District of Ohio. The employees presented eleven claims in their complaint which essentially alleged that Avco breached certain provisions of the Plans by denying them severance pay and retirement benefits.

II.

A.

The district court found that the five state law claims were preempted by federal law. We agree with the district court and affirm the court's ruling that these claims are preempted. *See Pilot Life Ins. Co.* v. *Dedeaux*, 107 S.Ct. 1549, 1555 (1987); *Varhola* v. *Doe*, 820 F.2d 809, 817 (6th Cir. 1987).

B.

The district court, relying on the principle that courts should not substitute their judgment for the judgment of trustees of a pension fund, upheld Avco's interpretation of the severance policy provisions. In doing so, the court dismissed Count II of the employee's complaint. As the district court correctly noted, decisions of fund administrators to deny benefits must be affirmed unless the decision was arbitrary, capricious, in bad faith, erroneous as a matter of law or unsupported by substantial evidence. *See Adcock* v. *Firestone Tire and Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987); *Blakeman* v. *Mead Containers*, 779 F.2d 1146, 1149 (6th Cir. 1985). Because we agree with the district court's conclusion that Avco's interpretation of the severance policy provision does not meet this standard, we affirm the dismissal of Count II.

C.

The district court agreed with the employees' claim that ¶6.2 of Avco's Retirement Plan (which relates to early retirement) rather than ¶11.5 of the Plan (which governs terminated employees) applied to the employees. In doing so, the court denied Avco's motion for summary judgment on Count VII and awarded attorney's fees and costs based on that count.

This court has held that if a provision in a plan is "susceptible to two interpretations . . . the Board's interpretation should be upheld even though the court disagrees with it, so long as the Board's interpretation is rationally related to a valid plan purpose and is not contrary to the plain language of the Plan." *Cook* v. *Pension Plan for Salaried Employees*, 801 F.2d 865, 870 (6th Cir. 1986). Although Avco's Retirement Plan can be interpreted as providing terminated employees retirement benefits pursuant to ¶6.2, as the employees argue, we find that Avco's interpretation is not contrary to the language of the Retirement Plan provisions. Thus, we reverse the district court's finding that Avco's interpretation of the retirement provisions was arbitrary and capricious and we reverse the district court's award of attorneys fees and costs. We hold that the employees were entitled to an actuarially equivalent pension reduced by 50% as provided by ¶11.5 of the Plan rather than an 85% early retirement pension as provided by ¶6.2 of the Plan.

D.

The district court dismissed the plaintiff's remaining claims which alleged various violations of ERISA's disclosure provisions. For the reasons stated by the district court, we affirm the dismissal of these claims.

III.

For the reasons stated above, we AFFIRM in part, REVERSE in part and remand to the district court with instructions to dismiss the action.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C 86-7101

PAUL ADAMS, et al.,

Plaintiffs

vs.

AVCO CORPORATION, et al.,

Defendants

OPINION AND ORDER
(Filed July 10, 1987)

POTTER, J.:

This cause is before the Court on defendant Avco Corporation's motion to dismiss and amended motion for summary judgment, plaintiffs' opposition, and defendant's reply thereto. Also before the Court is plaintiffs' motion for partial summary judgment. Defendant's motion for summary judgment filed on July 12, 1986 was incorporated by reference into defendant's amended motion for summary judgment.

This action is brought under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (ERISA) and the substantive laws of the State of Ohio. The 17 plaintiffs have filed suit to recover various employment related benefits owing to them from their former employer, defendant Avco Corporation.

As alleged in paragraph 20 of the amended complaint, Avco Corporation sold the assets of its New Idea Division to Allied Products Corporation in July, 1984. At the time of the sale, the plaintiffs in this action, with the sole exception of Lavern Bettinger, were offered and accepted employment by Allied Products Corporation and accordingly suffered no in-

terruption in the continuity of their employment. Plaintiff Bettinger was paid the net sum of $8,552.14 as severance pay by Avco Corporation, pursuant to its existing severance pay policy for salaried personnel. The other 16 plaintiffs who had accepted immediate employment by Allied were not awarded severance pay by Avco.

Avco also has a pension plan for its salaried employees which was applicable to plaintiffs at the time of the sale of the Avco New Idea Division. The plan provides for normal retirement at age 65 and for early retirement at or after age 55 for employees who have 10 years of credited service. Early retirement income for employees in active service at the time of such an election is less than the monthly benefit payable on normal retirement at age 65, but the benefit is "subsidized" in the sense that as it is defined by Section 6.2(B) of the Plan it is greater than the benefit produced by a straight actuarial reduction to present value.

Employees who are terminated from employment with 10 years of credited service prior to age 55 are considered "vested" and are eligible to elect early retirement upon attainment of age 55. None of the plaintiffs in this case were old enough to elect early retirement at the time of the sale of the Avco New Idea Division to Allied, but each of them had accrued sufficient credited service to become vested. Plaintiffs Brockman, Kaiser, Link, Schmit and Weitzel have subsequently attained age 55 and elected early retirement with benefits commencing immediately.

The Court will first address defendants' contentions regarding preemption of plaintiffs' state law claims. The Sixth Circuit ruled directly on this issue in *Blakeman* v. *Mead Containers*, 779 F.2d 1146 (6th Cir. 1985). The *Blakeman* court stated the following:

> Therefore, in determining whether each of plaintiff's claims is preempted by ERISA we inquire as to whether the conduct challenged by each claim was part of the administration of an employee benefit plan.

Blakeman, 779 F.2d at 1151.

Plaintiffs suggest that the cases of *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 462 U.S. 1 (1983) and *Bell* v. *Amcast Industrial Corp.*, 607 F. Supp. 486 (D.C. Ohio 1985) are applicable to the present case. The Court disagrees. The *Bell* court held the following:

> Plaintiffs' causes of action are the creatures solely of state common law . . . The dispute centers around that oral argument . . . The policy's coverage by or compliance with ERISA is irrelevant to the central issue in the case — whether defendant breached a contract negotiated in April, 1984, committed fraud on that date, or acted in such a way as to justify application of promissory estoppel.

Bell, 607 F. Supp. at 488. And in reference to *Franchise Tax Board*, the *Bell* court quoted the following:

> Despite the fact that the vacation trust was governed by ERISA the court held that the delinquency claim established a set of conditions without reference to federal law under which it might be enforced.

Id. at 488. So, when the *Bell* court reaffirmed that ERISA "does not purport to reach every question relating to plans covered by ERISA, nor did Congress intend to preempt entirely every state cause of action relating to such plans," that is exactly what they meant, questions or causes of action relating to such plans. The issue in the present case is not of the type in *Bell*, but deals with the actual administration of an employee benefit plan. Therefore, plaintiffs' state law claims including Counts 1, 2, 5, 6 and 9 of plaintiffs' amended complaint will be dismissed as preempted by ERISA.

The Court will next address Count 3 of plaintiffs' amended complaint. Plaintiffs bring this court to recover severance benefits pursuant to 29 U.S.C. § 1132(a)(1)(B) which provides:

> A civil action may be brought (1) by a participant or beneficiary (B) to recover benefits due to him under the terms of his plan to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan.

Defendant Avco suggests that denial of severance pay to plaintiffs was wholly consistent with the terms of the Avco New Idea severance pay policy. Therefore, Avco suggests, it would be appropriate to dismiss Count 3 of plaintiffs' amended complaint.

The Sixth Circuit in *Blakeman* offered some general guidelines in employee welfare benefit plan disputes. In *Blakeman*, the Sixth Circuit held the following:

> It is further clear and the parties agree that we review the decision of the administrator to deny benefits only to determine whether such decision was arbitrary, capricious, in bad faith, erroneous as a matter of law, or unsupported by substantial evidence.

Blakeman, 779 F.2d at 1149. See also, *Jung* v. *FMC Corporation*, 755 F.2d 708 (9th Cir. 1985). The *Blakeman* court also held the following:

> Generally speaking, trustees [administrators] are knowledgeable of the details of a trust fund (both its purpose and its operation) and thus they are in a position to make prudent judgments concerning participant eligibility. Courts are extremely reluctant to substitute their judgment for the judgment of the trustees and will do so only if the actions of the actions are not grounded on any reasonable basis.

Blakeman, 779 F.2d at 1150; *and see Adcock* v. *Firestone*, Case Nos. 85-6031, 85-6067 slip op. (6th Cir. June 26, 1987).

This Court, therefore, will only decide if the denial of benefits by the administrator of the Plan was arbitrary, capricious, or in bad faith. The Sixth Circuit in reaching their

decision looked at the distinctive characteristics of the Plan at issue. This Court, therefore, will do the same.

Exhibit D in plaintiffs' memorandum in support of plaintiffs' motion for partial summary judgment is the policy of defendant Avco as to the termination of salaried employees. This policy is dated September 9, 1981. Section 1 of this policy states the purpose of this particular plan. It states as follows:

> The purpose of this policy is to provide a measure of economic protection for employees who are involuntarily terminated for reasons other than misconduct or unsatisfactory performance and for employees who are permanently or indefinitely separated from active service due to adverse business conditions.

Plaintiffs argue that this clause clearly creates two eligible classes of severance pay recipients: (1) persons who are involuntarily terminated and (2) persons who are permanently or indefinitely separated from active service. It is alleged that plaintiffs fall within the former category for which there is no requirement of unemployment. Plaintiffs indicate that the terms unemployment or unemployed do not appear once in this policy. Plaintiffs also refer to paragraph 3 of said policy which delineates those classes of persons ineligible to receive severance pay. The applicable provision provides the following:

> No severance pay will be provided to any employee who voluntarily resigns or who is discharged or terminated for conduct or unsatisfactory job performance.

Plaintiffs point out that employed persons are not included in the ineligible category.

Defendants suggest that this policy was written only to benefit those who suffer unemployment and that the reference in the policy to employees who are involuntarily terminated and to employees who are permanently or indefinitely separated from active service is aimed at employees

who are out of work. Defendants attempt to substantiate this statement by referring to the provisions and wording of paragraph 2 of said policy, subtitled "Notice and Assistance." This paragraph discusses the notice that will be given to potentially terminated employees. It also discusses the efforts that will be made on the part of the employer to transfer employees within the company and if termination is inevitable, this paragraph discusses the counseling and the opportunities that are made available to the employees who will be terminated.

The Court finds, after reviewing *Blakeman* and the other cases that were referred to in *Blakeman* and *Adcock*, that summary judgment should be granted for defendant Avco Corporation as to Count 3 of plaintiffs' amended complaint. The Court in *Adcock* referred to the goal of the plan under consideration in that case as one to reduce the stress of terminated employees between the time of their release and securing other employment. The Adcock court said the following:

> This Court believes that it is a fair reading of the plan to require unemployment as a prerequisite to finding that a RIF occurred which justifies the payment of termination pay.

In the case sub judice, the Court focuses on the wording of the subparagraph entitled "Purpose" upon which plaintiffs base the essence of their argument. As it says in the first sentence of this paragraph, "The purpose of this policy is to provide a *measure of economic protection* for employees who are involuntarily terminated. . . ." (Emphasis added.) The Court finds that the wording "measure of economic protection" would be improperly construed if used in reference to employees who were immediately re-employed by a successor corporation. An employee who is immediately rehired by a successory corporation has no need for any measure of economic protection.

Plaintiffs argue that severance pay is an earned benefit, one

for which the employees work as much as they work for any other benefit or item of compensation. Plaintiffs refer to various state court cases that support this contention. See *Boling* v. *Clevepak Corp.*, 20 Ohio App. 3d 113 (1984); *Helle* v. *Landmark*, 15 Ohio App. 3d 7 (1984). Though these cases are on point as supporting plaintiffs' cause of action and defendants do not argue differently, the Court finds these state cases to be non-precedential in federal court. The Court as such will follow the guidelines as laid out by the Sixth Circuit in *Blakeman* and other cases upon which *Blakeman* was based. Therefore, defendants' motion as to Count 3 of plaintiffs' amended complaint will be granted and this count will be dismissed.

Count 4 of the amended complaint is predicated upon the theory that Avco's technical failure to furnish a summary plan description of the severance pay policy together with the absence of a claims procedure in that policy and the alleged failure to make provisions for disclosure of the policy to employees rose to the level of a violation of the provisions of ERISA mandating reporting, disclosure and fiduciary responsibilities. The reporting and disclosure requirements of ERISA are found in 29 U.S.C. §§ 1021 through 1031 and the fiduciary responsibility standards are found at 29 U.S.C. §§ 1101 through 1114.

Defendant Avco concedes that they failed to abide by the technical requirements of ERISA. However, the Court, in reaching a decision on this issue, will consider the good or bad faith of defendant in this failure to abide by the ERISA requirements and also any damages that resulted therefrom.

First it should be noted that the policy previously discussed regarding termination of salaried employees was made available to all plaintiffs in this case. In reviewing the affidavits of all the plaintiffs found in the exhibits of plaintiffs memorandum in support of plaintiffs' motion for partial summary judgment, it is found that each and every one of the plaintiffs asserts that while employed by Avco "he was aware of and understood the terms of Avco's severance pay policy,"

and was "aware of other formers employees who received severance pay under said policy." The Court also references its decision to the communique from George C. Coleman, Vice President of Human Resources for defendant Avco Corporation, dated June 22, 1984. This communique was to all Avco New Idea salaried employees regarding the sale of Avco New Idea to Allied Products Corporation. This communique discussed severance pay and other retirement benefits that were applicable to the salaried employees. The Court notes this communique in finding that defendant did not act in bad faith in its attempt to abide by the severance pay policy.

As the Court previously quoted from *Blakeman*, courts should be extremely reluctant to substitute their judgment for the judgments of the trustees and will do so only if the actions of the trustees are not grounded on any reasonable basis or if it finds that said trustees acted in bad faith. The Court finds neither in the present situation. The June 22 communique indicates defendant's attempt to provide notice and the necessary information to all the salaried employees. Therefore, the bad faith referred to in *Blau* v. *DelMonte Corporation*, 748 F.2d 1348 (9th Cir. 1985), is not applicable to the case at hand. The *Blau* court noted that failure of the corporation to not only provide notice but their obvious attempt to secrete the severance pay policy to its employees. That is not the case here. Though defendant Avco admits to failing to comply with the reporting and fiduciary responsibilities outlined in ERISA, this was not done in bad faith and therefore should not affect the administrator's decision to deny severance pay benefits. Therefore, Count 4 of the plaintiffs' amended complaint will also be dismissed.

Count 7 of plaintiffs' second amended complaint states that defendant failed to administer the Avco plan in accordance with the governing documents and instruments and have wrongfully reduced plaintiffs' retirement benefits. The standard of review of the administrator's determination is the "arbitrary and capricious" standard already set forth in the discussion of Counts 3 and 4. The analysis is also the same in

that the Court first looks to the plain meaning of the documents and instruments governing the plan.

The parties agree that plaintiffs are entitled to early retirement under § 5.2 of the Avco plan. The issue in dispute is the amount of benefits to which plaintiffs are entitled. Plaintiffs claim they are entitled to benefits under § 6.2. Defendants claim plaintiffs' amount is governed by § 11.5. The Court determines that Article 11 does not apply to participants who are terminated involuntarily. Article 11 clearly only applies in the situation where the participant terminates the employment relationship. The word "terminates" is a verb and the terms of Article 11 only apply where the participant acts to sever the employment relationship. "Participant" is defined in § 2.30 as an employee meeting the requirements under Article 4. There is no dispute that plaintiffs meet these requirements.

Section 2.30 also defines "Inactive Participant" and "Active Participant." The terms are not defined with respect to any benefit entitlement, but only as to employment status. There is no dispute that plaintiffs are inactive participants. Section 6.2 does not expressly require that a participant be and active participant to receive full early retirement benefits nor does it state that an inactive participant will be denied full benefits. For example, however, § 6.3 expressly states that active participant status will have a particular effect on income. Section 6.3 also expressly conditions a term on the basis that a participant "retire from the employment of a participating company." Section 6.2 has no such requirement, thus, active and inactive participants have the same entitlement to benefits under § 6.2. It is clear that the plan drafters distinguished between active and inactive participants where it was intended.

The manner of payment set forth in § 11.5 applys only to participants who become inactive "pursuant to this Article Eleven." Defendants contend that under Article 11 a participant terminates either through company action or the action of the participant. Defendants' contention is not reasonably

based on the clear meaning of the words in Article 11. The Avco plan defines "participant" separately from "company" or "participating company." The plain words of Article 11 require that the participant act to terminate the employment relationship. Further, a participant must terminate under Article 11 "for any reason other than death, retirement, or total disability," each of which requires some act of the participant in order for Article 11 to apply. Article 11 only applies on the express condition that the participant do some act and contains no express provision affecting manner of payment in the instance where the company acts. Article 11 only applys to a participant "who *becomes* an Inactive Participant *pursuant to Article Eleven.*" (§ 11.5, emphasis added.) To become an inactive participant under § 11.5 clearly requires that the participant act to terminate employment. The Court finds defendants' interpretation of the plan is arbitrary and capricious as a matter of law where the plan has not been interpreted in accordance with the documents and instruments governing the plan including reasonable interest as determined by the administrators. Plaintiffs are entitled to the full early retirement benefit under § 6.2 of the plan. Therefore, Count 7 of plaintiffs' second amended complaint is well taken.

Count 8 alleges violations of ERISA's reporting and disclosure requirements with respect to deficiencies in the summary plan description of the Avco retirement plan. The Court does not find the summary plan to be legally deficient. Therefore, Count 8 of plaintiffs' second amended complaint will be dismissed.

Count 10 alleges violation of 29 U.S.C. § 1024(b)(4) by defendant's failure to fully respond to plaintiffs' letter of November 18, 1985. The Court finds that plaintiffs' letter is not the type of written request envisioned by that section. Thus defendants' failure to respond in a manner satisfactory to plaintiffs does not subject them to damages under 29 U.S.C. § 1132. Count 10 will be dismissed.

Count 11 of plaintiffs' second amended complaint alleges the liability of the individual plan entities to plaintiffs, exclusive of any judgment rendered against defendant Avco in

its individual capacity as fiduciary and administrator. The individual plan entities named were joined as defendants to this action on plaintiffs' unopposed motion. Defendants did not respond to the allegations contained in Count 11 of plaintiffs' second amended complaint. Pursuant to Fed. R. Civ. P. 8(d), defendants admit the averments contained in Count 11.

Further, plaintiffs seek reasonable attorney's fees pursuant to 29 U.S.C. § 1132(g). In light of defendant Avco's conduct as administrator in the arbitrary and capricious denial of the benefits due plaintiffs under the plain terms of the documents, the Court will allow plaintiffs to recover from defendant Avco the reasonable attorney's fees and costs of this action as can be attributed to prosecuting Count 7 of plaintiffs' second amended complaint.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant's motion for summary judgment be, and hereby is, GRANTED in part and DENIED in part; and it is

FURTHER ORDERED that plaintiffs' motion for partial summary judgment be, and hereby, is GRANTED in part and DENIED in part.

/s/ JOHN W. POTTER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 87-3830
87-3831

PAUL ADAMS, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

AVCO CORPORATION, et al.,
Defendants-Appellants,
Cross-Appellees.

ORDER
(Filed January 26, 1989)

BEFORE: JONES and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

Paul Adams, et al., has petitioned the Court to rehear its decision of November 14, 1988 affirming in part and reversing in part the judgment of the district court.

The Court has considered the petition for rehearing offered in support thereof. Finding no issue of law or fact that was overlooked or misapprehended, the petition is found not to be well-taken.

It is therefore, ORDERED that the petition for rehearing is denied.

ENTERED BY ORDER OF
THE COURT
/s/ LEONARD GREEN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C 86-7101

PAUL ADAMS, et al.,

Plaintiffs

vs.

AVCO CORPORATION, et al.,

Defendants

ORDER
(Filed March 14, 1989)

POTTER, J.:

This cause is before the Court on remand from the United States Court of Appeals for the Sixth Circuit with instructions that this action be dismissed. Accordingly, it is

ORDERED that this case be, and hereby is, DISMISSED.

/s/ JOHN W. POTTER
United States District Judge

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: JAMES S. CALLAS, Clerk
U. S. District Court
Northern District of Ohio

By: /s/ CAROL J. RIPEZ
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PAUL ADAMS, et al.,

Petitioners,

vs.

AVCO CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS, AVCO CORPORATION, ET AL., IN OPPOSITION

DON A. BANTA
NAPHIN, BANTA & COX
55 West Monroe Street
Suite 2800
Chicago, Illinois 60603
(312) 236-0177

Attorney for Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

15 pp

QUESTION PRESENTED

In view of the independent judicial interpretations of the relevant plans below, as well as the delegated discretionary authority of the pension plan administrator, is it necessary to remand this case to afford a *Firestone de novo* review of the petitioners' eligibility for severance pay and a subsidized 85% pension?

LIST OF PARTIES

Respondents accept petitioners' listing of the parties, but note in addition that Avco Corporation is a subsidiary of Textron Inc., a Delaware corporation.

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IN THE

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS, AVCO CORPORATION, ET AL., IN OPPOSITION

STATEMENT OF THE CASE

Respondents adopt the statement of the case set forth by the Court of Appeals below in part I of its opinion, reproduced in the petition for a writ of certiorari, pages 2a-3a, as follows:

> "In July of 1984, plaintiffs/cross-appellees, seventeen ex-employees of Avco Corporation ("Avco") were terminated from their employment when Avco sold one of its divisions ("Division") to Allied Products Corporation ("Allied"). When Avco sold the Division, all

but one of the terminated employees were subsequently employed by Allied. Pursuant to Avco's Severance Pay Plan, the employee who was not hired by Allied received severance pay from Avco; however, none of the other terminated employees received severance benefits. After the employees complained that they also were entitled to severance pay under the Plan, Avco responded that the severance pay provisions applied only to workers who suffered a period of unemployment. The employees argued, however, that since the Plan provisions did not contain the word 'unemployment', unemployment was not a prerequisite for receiving severance benefits.

When Avco sold the Division to Allied, Avco's Retirement Plan provided for normal retirement at age 65 and for early retirement between the ages of 55 and 65 for employees who had 10 years of service with Avco. While none of the employees were eligible for early retirement when they worked for Avco, several of them became eligible and elected to receive early retirement benefits after they began working for Allied. Avco contends that if the employees had still been employed by Avco, they would have been eligible for an 85% early retirement benefit. However, since they no longer worked for Avco, Avco determined that they were entitled to only an actuarially equivalent retirement pension which was reduced by 50%.

The plaintiffs-appellants filed an action against Avco and its Severance Pay and Retirement Plans ("Plans") in the United States District Court for the Northern District of Ohio. The employees presented eleven claims in their complaint which essentially alleged that Avco breached certain provisions of the Plans by denying them severance pay and retirement benefits."

The District Court held on the severance pay issue that the wording of the applicable Avco severance pay policy should be interpreted to mean it was inapplicable to em-

ployees who were immediately re-employed by a successor corporation. Having adopted this construction of the policy, the District Court went on to conclude that Avco's denial of severance pay to the petitioners who were hired by Allied was not arbitrary, capricious or in bad faith. The Court of Appeals affirmed this ruling of the District Court.

On the pension issue, the District Court likewise formed its own construction of the plan instrument, which led it to believe that Avco's application of the actuarially reduced pension benefit to petitioners was "arbitrary and capricious". The Court of Appeals then undertook a second review of the meaning of the Avco pension plan document, and held that the petitioners were entitled to an actuarially equivalent pension reduced by 50% rather than an 85% early retirement pension, reversing the interpretation of the District Court.

ARGUMENT

I.

REMAND OF THIS CASE IS UNWARRANTED SINCE *DE NOVO* JUDICIAL REVIEW OF BOTH THE SEVERANCE AND PENSION PLAN ISSUES HAS ALREADY BEEN ACCOMPLISHED BELOW IN AVCO'S FAVOR.

The District Judge had this to say about Avco's severance pay policy:

> "In the case sub judice, the Court focuses on the wording of the subparagraph entitled 'Purpose' upon which plaintiffs base the essence of their argument. As it says in the first sentence of this paragraph, 'The purpose of this policy is to provide a measure

> of economic protection for employees who are involuntarily terminated. . . .' (Emphasis added). The Court finds that the wording 'measure of economic protection' would be improperly construed if used in reference to employees who were immediately re-employed by a successor corporation. An employee who is immediately rehired by a successor corporation has no need for any measure of economic protection." [petition, p. 10a]

Having reached this independent, *de novo* rendering of the wording of Avco's severance pay instrument, the District Judge proceeded to measure it against the "guidelines as laid out by the Sixth Circuit" in *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985) (petition, p. 11a). Needless to say, the District Judge's finding that Avco's reading of the plan was the correct reading constrained the legal conclusion that the Avco reading could never be viewed as violating the "arbitrary and capricious" test. Since the District Judge has already laid down his independent interpretation of the severance policy, there is no reason whatever to vacate the judgment of the Sixth Circuit and remand this case with instructions for a further remand to the District Court for consideration in light of *de novo* review standards enunciated in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. ____, 109 S.Ct. 948 (February 21, 1989).

On the pension issue, the Court of Appeals similarly made its own independent, *de novo* analysis of the meaning of Avco's pension plan. In reversing the District Judge's interpretation of Avco's plan provisions detailing the eligibility of vested persons who had not reached early retirement age at the time of termination of employment, the Court of Appeals said this:

> "We hold that the employees were entitled to an actuarially equivalent pension reduced by 50% as pro-

> vided by ¶ 11.5 of the Plan rather than an 85% early retirement pension as provided by ¶ 6.2 of the Plan." [petition, p. 4a]

This is a clear, unambiguous and explicit *de novo* interpretation of the Avco plan. As in the case of the severance pay count, there is no necessity for a remand to the District Court below, as sought by petitioners, in order to achieve something which has already been accomplished.

II.

AVCO'S PENSION PLAN GIVES THE ADMINISTRATOR UNLIMITED DISCRETIONARY AUTHORITY TO DETERMINE ELIGIBILITY FOR BENEFITS AND TO CONSTRUE THE TERMS OF THE PLAN, OBVIATING THE NEED FOR *DE NOVO* REVIEW OF THE DENIAL OF BENEFITS TO PETITIONERS.

In the *Firestone* case, this Court held that a denial of benefits need not be reviewed under a *de novo* standard where the plan "gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 109 S.Ct. at p. 956. Avco's pension plan instrument endows its administrator with exactly that sort of authority.

The Avco retirement plan was appended to the second amended complaint below as Exhibit D, and the provisions of Article Fourteen, Sections 14.1 and 14.2, of the plan are reproduced in the Appendix of this Brief. Section 14.2 explicitly endows the administrative Committee with "the power to interpret and construe the plan, to determine all questions of eligibility and of the status and rights of Participants and others and, in general, to decide any disputes arising hereunder." This section goes on to reinforce its reservation of discretion by mandating that the determination of the administrator "on all matters of

administration shall be conclusive and binding on all persons." Unlike the plan in *Firestone*, where there was "no evidence . . . the administrator has the power to construe uncertain terms or that eligibility determinations are to be given deference", it is difficult to imagine how the Avco administrator's discretion could be more forcefully and more powerfully articulated. 109 S.Ct. at p. 954. Accordingly, in addition to the *de novo* interpretation of the pension plan adopted by the Court of Appeals, the reservation of administrative discretion incorporated in the Avco retirement plan provides a further and equally compelling reason to decline the invitation of petitioners to remand this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DON A. BANTA
NAPHIN, BANTA & COX
Xerox Centre, Suite 2800
55 West Monroe Street
Chicago, Illinois 60603
(312) 236-0177

Attorney for Respondents

APPENDIX

ARTICLE FOURTEEN

ADMINISTRATION

14.1 **Committee**—The general administration of the Plan and the responsibility for carrying out the provisions thereof shall be placed in the Committee and said Committee shall act as the named fiduciary. Committee members, including a chairman, shall be appointed by the Board or the Executive Committee and the Plan's Committee members shall at no time be less than three in number. Any vacancy in the Committee shall be filled by the Board or the Executive Committee. A member may resign by written notice to the Board or Executive Committee and such resignation shall become effective at delivery or on any later date specified therein. The members of the Committee shall appoint a secretary who may be, but need not be, a member of the Committee.

14.2 **Powers**—The Committee shall have complete control of the administration of the Plan with all powers necessary to enable it properly to carry out its duties in that respect. Without limiting the generality of the foregoing, the Committee shall have the power to interpret and construe the Plan, to determine all questions of eligibility and of the status and rights of Participants and others and, in general, to decide any disputes arising hereunder. Its determination on all matters of administration shall be conclusive and binding on all persons. The Committee shall compute and certify to the Trustee or Insurance Company the amount and manner of payment of benefits to which Pensioners, Eligible Spouses, Co-Pensioners or Beneficiaries become en-

titled. All disbursements by the Trustee or Insurance Company, except for the ordinary expenses of administration of such Trust or Insurance Contract, shall be made only upon the written instructions of the Committee. The Committee may appoint agents and delegate to such agents all or part of their powers and fiduciary responsibilities under this Plan. The compensation, if any, of such agents shall be fixed by the Committee within the limits set by the Company. The Committee may employ counsel and engage such clerical, financial or other services as it may deem necessary or appropriate.

14.3 **Expenses**—All expenses of the Committee shall be paid by the Company. No member of the Committee shall be entitled to any compensation by virtue of his service as such or be required to give any bond or other security except as required by law.

14.4 **Standard of Care**—The members of the Committee shall discharge their duties with respect to the Plan solely in the interests of the Participants and their beneficiaries with the purpose of providing benefits and defraying reasonable expenses of administering the Plan, with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and in accordance with the provisions of the Plan insofar as such text is consistent with the provisions of ERISA.

14.5 **Management of Assets**—The Board or the Executive Committee shall have the sole responsibility for the selection of the Trustees and Insurance Company and investment manager. The Trustee and Insurance Company and investment manager shall have responsibility for the management and control of the assets of the funds within their care, as the Board or Executive Committee shall determine.

14.6 **Funding Policy**—The Board or Executive Committee shall establish a funding policy and method with respect to funding the Plan which satisfies the requirements of Section 402(b) of ERISA.

14.7 **Indemnity**—The Participating Companies shall indemnify and save harmless members of the Committee and any other officers or Employees who are involved in the administration of the Plan from the effects and consequences of their acts, omissions and conduct in their formal capacity to the extent permitted by law. No part of the Fund shall be used for indemnification payments.

14.8 **Claims Procedure**—A Participant, Eligible Spouse, Co-Pensioner or Beneficiary must make an application for benefits, in writing, to the party or parties designated by the Committee, within ninety (90) days prior to the date on which payments of his benefit is to commence. If such application for benefits is denied in whole or in part, the Committee shall notify the claimant within thirty (30) days in writing in non-technical language of (i) the reason for the denial; (ii) the pertinent Paragraph or Paragraphs of the Plan upon which the denial is based; (iii) any additional material or information necessary to perfect the claim and reasons why such information is necessary; and (iv) an explanation of the Plan's review procedure.

14.9 **Review Procedure**—Within sixty (60) days after receipt of the written notification denying a claim made pursuant to Paragraph 14.8, any individual affected thereby may request that the claim denial be reconsidered. Such claimant shall state in writing, delivered to the Committee, the reasons why the denial is erroneous. The claimant shall have the opportunity to review any pertinent documents that he may request. If he so requests, the Committee shall grant him a hearing; or if he does not request a hearing, the Committee shall reach a determination based on his written appeal. He may appear

before and present his views to the Committee, in person or by his duly authorized representative, at a meeting at which at least a majority of the members of the Committee are present.

The Committee shall make a decision not later than sixty (60) days after the filing of the notification of appeal. The Committee's decision shall be stated in writing, with its reasons therefore, including specific references to the pertinent Plan provision upon which the decision is based. Such decision shall be final and binding on all parties unless the Committee on its motion agrees to reconsider such claim. Copies of such decision shall be made available to the claimant.

14.10 **Use of Actuary**—The Committee shall employ or engage an Actuary to make actuarial valuations of the liabilities under this Plan, and other calculations for any purposes of this Plan, to make recommendations as to the amounts of contributions to be made and to perform such other services deemed necessary or advisable in connection with the administration of the Plan.